No. 77.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

MONTANA-DAKOTA UTILITIES CO.,
a Corporation,
Petitioner,

v.

NORTHWESTERN PUBLIC SERVICE COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court denying respondent's motion to dismiss is reported in 73 F. S. 149 (R. I, 112-113). Its opinion on the merits is not reported (R. V, 1883-1887). The opinion of the Court of Appeals is reported in 181 F. 2d 19 (R. VI, 1988-1995).

JURISDICTION.

Respondent agrees with petitioner that jurisdiction of this Court rests on 28 U. S. C. 1254, but denies that jurisdiction over this action is conferred by 16 U. S. C. 825p, as more fully discussed herein (pp. 28-30).

QUESTIONS PRESENTED.

The action is for damages. There is no diversity of citizenship between the parties, yet the suit was brought in the United States District Court. The complaint alleges that the action arises under the Federal Power Act and the Court held that it had jurisdiction "by implication" to enforce the reasonable rates provision of the Act and to award damages for its breach. The questions arise:

1. Whether the District Court had power or jurisdiction at the instance of a private party to enforce the Federal Power Act, or award damages for its breach.

2. Whether the District Court had jurisdiction to determine wholesale rates for public utilities for a past period, notwithstanding the existence of legal rates on file with the Federal Power Commission under Section 205 of the Federal Power Act, and to enter a judgment for the difference.

3. Whether the Federal Power Commission has primary jurisdiction for the establishment of legal wholesale rates between public utilities which would require resort to the Commission with regard to the rates or any orders affecting them by any interested party.

4. Whether it was the intention of Congress in adopting the Federal Power Act to provide a forum, either commission or court, for the recovery of reparations for past periods.

5. Whether constructive fraud and "domination" can be predicated upon interlocking directors and officers in adjoining utility companies, separately owned, where the interlocking directors and officers were authorized and approved by the Commission under Section 305 (b) of the Federal Power Act.

6. Whether a charge of constructive fraud and "domination" through authorized interlocking directors and officers supplies a legal reason for not applying to the Commission for relief from alleged unreasonable rates.

STATUTES INVOLVED.

The statutes involved are set out in the Appendix.

STATEMENT.

The scene of this controversy is laid in North and South Dakota, and the period in issue is 1935 to 1945. The two public utility properties which ultimately were acquired by petitioner were located, one above the other, north of respondent's property. All three properties had once been controlled by the same holding company, but throughout the period in issue here the two northernmost properties were controlled by one holding company, United Public Utilities Corporation (UPU), and respondent was controlled by a separate holding company, The Middle West Corporation (Middle West).

Prior to 1935, while the three public utilities were still controlled by a single holding company, their facilities had been physically interconnected and a joint management arrangement had been entered into, with the result that the three utilities were operated substantially as a single system. When the two northern companies and respondent came under the separate control of UPU and Middle West, respectively, the two holding companies

decided to continue the joint management arrangement, for reasons of economy. On UPU's part this decision was supported by a study of comparative costs and was in contrast to UPU's decision to terminate six similar arrangements relating to others of its subsidiaries.* Since the interlocking arrangement is the source of petitioner's present claim that "domination" of its predecessors precluded their obtaining administrative relief, the facts as to actual operation of the arrangement are of importance.

A single general office was maintained for the northern companies as well as respondent, and the holding company owners separately elected annually, from the operating personnel, common directors for the three corporate boards. The chief executive officer of UPU (White) was at all times a director of the northern companies but never was on the board of respondent.[1] (In addition to White's being an officer and director of UPU, his family had a substantial stock interest in that company; on the other hand, he had no interest whatever in respondent or in its parent company.[2]) White personally selected or approved the joint directors and officers before they were elected or re-elected. He testified that he had satisfied himself as to the "ability", "integrity" and "loyalty" of the joint personnel and as to the quality of their work.[3]

Each of the three operating companies was a "public utility" within the meaning of the Federal Power Act, 49 Stat. 847, 16 U. S. C. 824 et seq. In compliance with Section 305 (b) of the Act, 16 U. S. C. 825d (b),[4] each person who served as a joint director or officer at any time

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* R. IV, 1316-1324; V, 1563.

1 R. IV, 1057, 1106.

2 R. IV, 1067, 1364-1366, 1380-1381.

3 R. IV, 1096-1097, 1349, 1328, 1079. In one instance, when White became dissatisfied with a joint president, he caused his removal (R. IV, 1318-1319).

4 The text of this Section is set out in the Appendix, p. 48.

during the ten-year period filed with the Federal Power Commission (FPC) his individual application for authority to hold interlocking positions. These applications were granted by the Commission upon its finding in each case that "neither public nor private interests will be adversely affected by the holding of such positions."[5]

While the three companies were operated locally as a single system, it was the practice to refer to the respective parent companies all matters of importance as to which it was thought there might be a conflict of interest.[6]

Through the ten-year period, rates and charges for the interchange of electric energy, for the use of interconnection facilities, and for pooling reserve capacity between the northern companies and respondent were established in a series of inter-company contracts. (The earliest was a 1935 oral contract and the latest was a written contract dated March 13, 1943. In 1939 the two northern companies were merged and the name taken was Dakota Public Service Company—"Dakota"; at that time the contracts were remade in the name of the successor company.[7]) All of the rates and charges were negotiated on behalf of the UPU group by White personally or, after having been initially worked out by the operating personnel, were reviewed and confirmed by him.[8] White's review was not merely perfunctory. He took pains to obtain pertinent data and in all instances secured the advice of an expert

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5 R. I, 323-343, 347, 353-362.

6 R. IV, 1098-1099; V, 1542-1546, 1853, 1833-1834, 1845-1846, cf. 1540. Cf. R. IV, 1111-1112.

7 The contracts involved are set out at R. 34-105, 178-186.

8 1936 contract: R. IV, 1125-1138; V, 1639, 1644; 1938 contract: R. IV, 1178-1184; V, 1645-1646, 1650; 1939 contract: R. IV, 1185; V, 1852; 1941 contract: R. IV, 1196-1229; 1943 amendment: R. IV, 1229-1262; V, 1656; joint management contracts: R. IV, 1099, 1384. He delayed for some four years the execution of the 1936 contract in order to avoid the outlay of cash by his companies, and he thereafter invalidated the first execution of that contract while additional technical studies were conducted under his instructions (R. IV, 1072, 1020, 1106-1110; I, 464-467; V, 1835).

engineer of the UPU organization, having no relation to respondent or its parent, or of independent engineers.[9] In addition, UPU's general counsel (Francis H. Scheetz of Philadelphia), who had no connection with respondent or its parent, either drafted or passed upon all written contracts.[10] Moreover, the written contracts were submitted for approval in advance to the UPU board.[11]

All of the contracts establishing intercompany rates and charges during the ten-year period were filed with the FPC under Section 205 of the Act, 16 U. S. C. 824d. The northern companies either participated in each filing or filed a certificate of concurrence, and the UPU management and counsel participated in various determinations regarding the filing procedures.[12] The Commission established effective dates of filing in all cases, after obtaining additional information by correspondence in certain instances.[13] At no time in the ten-year period did the FPC or any other person, including UPU, challenge any of the filed rates under the statutory standard.[14] In 1942, in integration proceedings before the Securities and Exchange Commission (SEC), under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79 et seq., involving the UPU system (not respondent or its

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9 Reports: R. IV, 1331, 1020, 1026, 1282-1286; V, 1846. Inspection trips: R. IV, 1059-1061, 1028; V, 1846, 1853. Lakin, an engineer, President of 11 UPU subsidiaries and a UPU director (R. IV, 1194; V, 1601, 1604), inspected the properties and reported to White concerning the three basic rates in issue (R. IV, 1113, 1115, 1128; V, 1605-1615; IV, 1366-1371). Cf. R. IV, 1118-1119.

10 R. V, 1636; as to the interconnection contract: R. IV, 1132; V, 1643-1644, 1647; as to the reserve capacity contract: R. IV, 1178; as to the 1939 contracts: R. IV, 1188; V, 1652; as to the 1941 contract: R. V, 1509, 1645-1646, 1654-1655; as to the 1943 amendment: R. IV, 1234-1253, 1257-1258; V, 1656-1657; and as to the joint management arrangement: R. V, 1637.

11 R. IV, 1114-1115, 1121-1122, 1127-1128, 1178-1184, 1099, 1192-1193, 1255-1256; V, 1648.

12 R. I, 267-269, 343-345, 297-298; IV, 1177-1178, 1224-1225; V, 1652.

13 R. I, 34, 35, 43, 61, 68, 87, 10.., 108-111, 353.

14 R. IV, 1587-1588.

parent) the operation of this joint management arrangement and the terms of the prevailing inter-company contracts—including the three rates in issue—were fully explored and their fairness to the UPU group was vigorously asserted by White and all other UPU witnesses, and by Scheetz, its counsel.[15]

Petitioner itself did not come upon the scene until October 19, 1945—the close of the ten-year period—when it purchased the stock of Dakota from UPU and succeeded to all of Dakota's assets by assignment.[16] The terms of the sale and purchase were approved by the SEC and by the FPC. Petitioner continued to operate under the contracts, but on August 12, 1946, it filed a complaint under the Federal Power Act, in which it asked the Commission to determine reasonable rates for the future and alleged that the rate and joint management contracts were the result of domination over its predecessors on the part of Middle West.[17] (At this stage there was no hint of petitioner's present crucial contention, that is, domination by the present respondent.) That complaint never went to hearing since new temporary rates were agreed upon between the companies for the period following the date of termination of the rate contract, August 31, 1947.[18]

On February 3, 1947, petitioner brought the present action in the District Court in South Dakota, seeking, as stated by the Court of Appeals in this case, "to recover damages according to the principles of common law" for the period from September 1, 1935, to the date of petitioner's purchase of the Dakota stock.[19] The complaint

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15 R. IV, 1487 ff.; V, 1524 ff., 1540-1548, 1556 ff., 1657.

16 Dakota and its two constituent companies, referred to above as the "northern companies," are generally referred to as "petitioner's predecessors" in the balance of this brief.

17 R. I, 149-168; received in evidence: R. V, 1587.

18 R. V, 1875-1877.

19 R. VI, 1988.

alleged that the contracts were tainted with fraud, due to the fact that the interlocking directors and officers were involved in making them; that the rates and charges provided in the contracts were "without consideration, unjust, unreasonable and unlawful" in their entirety; and that respondent "unjustly, without consideration, fraudulently, unreasonably, unfairly and unlawfully took and received from" predecessors of petitioner the moneys sued for in the various counts.[20] The complaint asked that the contracts be declared void; that the rates and charges be declared unjust and unreasonable, and that fair and reasonable amounts be determined; also asked for an accounting and for a money judgment in specified amount.[21]

Both petitioner and respondent are Delaware corporations.[22] There being no diversity of citizenship, federal jurisdiction was ascribed to alleged violations of the Federal Power Act. The trial court sustained federal jurisdiction under the Act "by implication."[23] It held that "all of the contracts in question were presumptively fraudulent as to plaintiff's assignor and its predecessors, in view of the common directors and officers. Defendant has failed to rebut this presumption and sustain the fairness of the contracts."[24] Thus, the Court did not purport to set aside—it completely ignored—the series of orders of the FPC approving the interlocking positions; it merely decided that the relationship resulted, as a matter of law, in constructive fraud. Largely on this premise, the Court gave no weight to the other series of orders of the FPC which approved the filing of the contract rates. It determined that the rates and charges provided in the con-

20 E. g., R. I, 7.

21 R. I, 26-27, 177-178.

22 R. I, 2, 116, 210.

23 R. I, 112-113; V, 1883.

24 R. V, 1963, conclusion of law 13.

tracts were unreasonable; found and supplied other rates which it determined would have been reasonable; gave judgment for the difference, in the aggregate amount of $779,958.30, inclusive of interest.[25]

On appeal by respondent, the Court of Appeals for the Eighth Circuit reversed the judgment on the grounds that the District Court was without jurisdiction to pass on the reasonableness of the rates, that the subject matter of the action was within the primary jurisdiction of the Commission, and that the administrative remedies provided in the Federal Power Act had not been exhausted.[26] The Court of Appeals did not review the merits; thus, the only determination of unreasonableness of the rates is that of the District Court, whose jurisdiction to make the determination is in issue.

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25 R. V, 1960-1965.

26 R. VI, 1992-1995.

SUMMARY OF THE ARGUMENT.

The petitioner having purchased the property of the subsidiary called "Dakota" from its owner, the United Public Utilities Corporation, is seeking here to recover from respondent a damage claim based on charges that petitioner's predecessors had been defrauded by respondent through the period 1935 to 1945 due to the rates and charges contracted between them for electric energy. Absent diversity of citizenship, federal jurisdiction is predicated on the allegation that "the action arises under the Federal Power Act * * * and under a law of the United States regulating commerce under said Federal Power Act."[1] In substance the claim is that fraud is inferred from the existence of interlocking relationships among the officers and some of the directors of the respondent and the predecessors of petitioner during the period in question. From this relationship constructive fraud is alleged to have resulted, and it is alleged that petitioner's predecessors were damaged by it, but respondent was not. The fraud went into the contracts between the parties providing for interchange rates, interconnection and reserve capacity charges, according to this theory, so that the contracts are said to be void and to furnish no justification for the payments (under or over) made under them. The Court of Appeals concluded that the claim was one for damages at common law, and thus far it undoubtedly appears that it is so. However, beyond this point the contracts containing the rates and charges provisions were filed with the Federal Power Commission by the respondent with the concurrence of petitioner's predecessors. It was necessary to file them. The law required it. The filings and concurrences having been approved by the Commission, the rates and charges therein became and remain the only legal rates which could exist

1 Pet. Brief, p. 13.

between the parties. Their filing conveyed notice to the Commission, all interested rate making bodies, and the consumer-customers of these wholesale contractors. But petitioner claims that the rates and charges provided in the contracts and established as the legal rates through their filing and approval, were in fact unreasonable, hence, under Section 205 (a), unlawful. Without applying to the Commission to disestablish the filings, the petitioner brought suit in the federal District Court in 1947 to have rival rates and charges established by court decree. These were to be reasonable, hence lawful, rates and charges.

The District Court, overruling objection to the proceedings on jurisdictional grounds, determined that the filed rates and charges then existing unchallenged in the Federal Power Commission were unlawful and had been so for the ten year period from 1935 to 1945. In overruling the plea to the jurisdiction, the District Court, holding that the Federal Power Act did not explicitly provide jurisdiction in the courts for its enforcement or to award reparations or damages for its breach, concluded nevertheless that there was jurisdiction "by implication" to do so. The attack on the orders approving the filings by the Commission obviously was collateral, and the effect of the judgment of the District Court was to ignore the existence of the established legal rates, upon the ground that they were unlawful and of no validity. It seems clear that the Act did not undertake to supply either a right to reparations, damages or windfalls, or to furnish any remedy for enforcement of any such claimed right.

The pattern of the Act shows that Congress entrusted the duty to administer the statutory standard of reasonable rates to the Federal Power Commission and not to the courts, either explicitly or by implication. The consumers, not public utilities, were to be the beneficiaries of the law. If current and prospective regulation is not efficient to keep wholesale rates in line, then the entire scheme is a failure,

since consumers obviously would derive no benefit from reparations or damages collected by the wholesale utilities for past periods not included in their retail rates. The legislative history of the Act itself rejects any such construction. As is noted by petitioner in its brief,[2] Congress originally had before it a bill providing for reparations proceedings within the Commission, with enforcement referred to court action. Those provisions were eliminated from the final draft of the statute. They were dropped because contrary to the purposes of the Act, and not for the reason suggested by petitioner, namely, to leave the subject of reparations and damages for past periods to the courts. The idea which prevailed with the Committee, and which undoubtedly went into the Act, was to rely on current and prospective regulation exclusively to control the relations of wholesalers and producers with each other, not to provide a process by which a public utility might have or claim the right to go ahead receiving service at an established legal rate for a period of years, and then to maintain a court action for lump sum damages in which the customer-consumers would have no participation.

In the brief of petitioner (pages 4 and 5), it is tentatively suggested, rather than seriously argued, that Section 825 (p) (Section 317) of the Power Act "Seems to confirm jurisdiction of cases like this to the United States District Court, to the exclusion of state courts, * * *." This suggestion could be misleading unless Section 317 is read in context with the three sections immediately preceding. Those sections supply enforcement machinery for the Commission, not for private litigants. Section 317 designates the district courts as the exclusive jurisdiction for such enforcement, designates the venue for criminal and civil enforcement proceedings, which the Commission is authorized in the next preceding sections to undertake. The review was to be that provided in Sections 225 and

2 Pet. Brief, p. 9.

347 of Title 28, and no costs were to be taxed against the Commission in any case.[3] Here again the legislative history compels the conclusion that Section 317 was intended to refer only to Commission enforcement, not to private suits by public utilities against each other.

At the outset the respondent challenges any claim of fraud based upon the fact of interlocking officers and directors, since their positions had the formal approval of the Commission under authority of Section 305 (b) of the Act. Clearly, as a matter of law, no fraud may be inferred from relationships made lawful and proper by authority of the Commission exercised within the scope of its statutory powers. The record shows, therefore—the petition and brief of petitioner confirms—that there is no fraud here which can be recognized by the Court. The petitioner does not claim to have applied to the Commission, or that its predecessors or their corporate owner, at any time applied to the Commission to set aside the eleven formal orders made during the ten years drawn in question approving the positions of these corporate officials, but on the contrary the orders, like the filing approvals, stand to this day as valid, vital instruments of authorized power.

The petitioner claims that the constructive fraud alleged to arise from the authorized interlocking relationships resulted in "dominance" over its predecessors so as to enable respondent to secure the allegedly void contracts for rates and charges which were filed with the Commission. The same "dominance," so it is alleged, stood in the way of its predecessors having resort to the Commission for relief against the rates and charges, and against the alleged fraud on the petitioner. Again, the petition for certiorari in this Court and the briefs of counsel refute this contention. "Dominance" which would paralyze the active minds and bodies of the owners of the property which the peti-

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3 Sections 314-317, inclusive.

tioner has purchased cannot be held to flow from an interlocking relationship made legal, for all of the purposes of wholesale transactions by public utilities, by proper orders of the Commission. Respondent does not wish to discuss the facts as though the scope of the present proceedings would involve the merits of these claims of fraud. That issue, together with the defenses of ratification and statute of limitations, were not reached in the Court of Appeals and are not before this Court now. But enough may be said to show beyond question that the United Public Utilities Corporation, the person who sold these properties to the petitioner; the owner of its predecessors throughout the ten year period under scrutiny, was not hampered or hindered in any way or prevented from applying to the Commission for relief at any time. No "dominance" over that interested party is pretended or claimed by the petitioner either in its petition or brief. The UPU president, who at all times was also a director of the two subsidiaries eventually purchased by the petitioner, was free to act on behalf of his properties and in his own interest. This much may be said as bearing upon the question of jurisdiction presented here. It is sufficient to show the flimsy tissue supporting the argument of "dominance" such as to prevent resort to the Commission. It destroys the excuses offered by petitioner for the failure through the ten years between 1935 and 1945, and even down to the present moment, of any person to apply to the Federal Power Commission for relief. It is assumed that petitioner thinks that, unless petitioner's predecessors were prevented by this fraud, it would have been necessary to come to the Commission in the first instance. Otherwise no excuse would be needed.

There is, therefore, both a legal reason and a factual reason apparent upon the face of these proceedings such as to warrant the Court in not accepting the excuse of "domination."

As a matter of fact, petitioner has given no reason why it could not itself have resorted to the Federal Power Commission to challenge the validity of the orders approving the filing of the rates and the orders authorizing the interlocking positions of certain of the officers and directors of the utilities. As is admitted here, petitioner actually filed a complaint with the Power Commission in February of 1946, alleging the filed rates to have been unreasonable and asking the Commission to fix new rates.[4] It offers no reason why its claim of constructive fraud such as to void the contracts then on file as the bases for the existing legal rates was not then brought to the attention of the Commission and a hearing requested on its complaint. It did not do that. It preferred to launch a collateral attack in the district court the next year, which ignored the existence of the legal rates and orders, as well, through the claim that they were unlawful and need not be considered. No such course was contemplated by the Federal Power Act, and approval of that course would do violence to clear purposes of the statute. A judgment in the district court which would enable the utility to enrich itself at the expense of another would have the effect to directly oppose the regulatory program designed to pass on to retail users all of the profits and benefits which should go into the rates. Utility rate making must not be left to circumstances so fortuitous and uncertain. Such a construction of the Power Act would result in the regulation of interstate commerce public utilities for the benefit of the utility rather than its retail customers.

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[4] Pet. Brief, p. 12.

ARGUMENT.

I.

The Judicial Code Does Not Confer Jurisdiction Upon District Courts to Entertain Private Proceedings Under the Federal Power Act.

The complaint alleged that "the action arises under the Federal Power Act, as hereinafter more fully appears, and under a law of the United States regulating commerce under said Federal Power Act" (R. I, 2). The District Court sustained this claim of jurisdiction. In this Court petitioner argues that "the provisions of the Judicial Code defining jurisdiction of the District Courts are enough" (Pet. Brief, p. 17). Its concern with the Power Act is whether it "deprives the courts of jurisdiction otherwise vested in them by the Judicial Code" (Pet. Brief, p. 15; cf. id. p. 17).

Petitioner's logic here is difficult. "Deprives" connotes taking away something that existed before. The Federal Power Act could "deprive" district courts of jurisdiction only if jurisdiction existed apart from and prior to the Federal Power Act. But the only jurisdiction referred to by petitioner as being "deprived" by the Federal Power Act is the jurisdiction created by the provisions of the Judicial Code referring to suits arising under "laws of the United States" or "any law regulating commerce", and petitioner does not refer to any such law except the Federal Power Act itself. What, then, is the jurisdiction "otherwise vested in [the district courts] by the Judicial Code" of which the Federal Power Act "deprives" them?

The question seems to answer itself and to expose the fallacy of petitioner's reliance upon the Judicial Code

per se. The Judicial Code confers jurisdiction (among other things) over matters arising under laws of the United States and laws regulating commerce; it does not itself designate what those "matters" are. In enacting a law regulating commerce, as in any other law, Congress may decide to create or not to create a particular right or remedy. If Congress did not intend in enacting a particular law to create a right or remedy by court proceedings, the Judicial Code would not supply such an intent. *Switchmen's Union of N. A. v. National Mediation Board* (1943), 320 U. S. 297.

The Judicial Code was with us when this Court decided *Texas & Pacific Ry. Co. v. Abilene Oil Co.* (1907), 204 U. S. 426; *General Committee, etc., v. Missouri-Kansas-Texas R. Co. et al.* (1943), 320 U. S. 323, and the many other cases holding that federal courts lacked jurisdiction to grant relief under various laws of the United States, including laws regulating commerce. So here, the Judicial Code is of no ultimate avail to petitioner unless the Federal Power Act first creates a right and remedy in petitioner.

The real inquiry, then, is whether Congress intended, in enacting the Federal Power Act, that federal district courts should have jurisdiction to entertain proceedings of the type here involved, to enforce rights said to be created by the Act, for which no remedy was provided.[1]

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1 The problem of statutory interpretation as to whether a right or remedy by court proceedings was intended to be created under a particular law of the United States, if substantial and not merely colorable, might itself present a federal question. *Gully v. First National Bank* (1936), 299 U. S. 109. In this case, however, in view of the rule of primary jurisdiction firmly established by this Court in 1907 and uniformly followed in numerous subsequent cases (see pages 22-24, infra) the claim that a judicial remedy was intended to be created under the Federal Power Act would seem to be plainly wanting in substance so that dismissal for want of jurisdiction would have been proper. *Levering & G. Co. v. Morrin* (1933), 289 U. S. 103, 105-6; *California Water Service Co. v. Redding* (1938), 304 U. S. 252, 255. But even if it be assumed that the question of statutory interpretation is not plainly wanting in substance, if the answer to that question is that Congress did not intend to create the remedy sought by petitioner here, the Judicial Code could not become the basis of jurisdiction to sustain petitioner's claims.

II.

The District Court Had No Jurisdiction Under the Federal Power Act to Entertain the Present Suit and to Substitute Its Own Conception of Reasonable Rates for the Rates Filed with the Federal Power Commission Pursuant to the Act.

The complaint, in invoking the Federal Power Act as the basis of federal jurisdiction, proceeds on the theory that petitioner had a right, under the Act, to obtain a determination by the District Court as to what rates would have been just and reasonable, and to recover the difference between the amount so determined and the amount paid and received under the rates actually filed.[2] The District Court held that the Act did not specifically authorize such a suit, but that,

> "in the absence of an adequate administrative remedy, the only relief remaining to those who have sustained damage by reason of such a breach of statutory duty as is set forth in the complaint, is in resort to the Court which, in my opinion, is vested with the necessary authority, as well as the duty to entertain such suit, *by implication.*" (Emphasis supplied).

Referring to a similar claim of implied judicial power under the Railway Labor Act, this Court said, through Mr. Justice Douglas, in *General Committee etc. v. Missouri-Kansas-Texas R. Co. et al.* (1943), 320 U. S. 323, 337:

> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied."

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2 The complaint also was founded upon alleged violations of the filing requirements of the Act, but all such contentions were rejected by the Court of Appeals and have been abandoned by petitioner.

With reference to the Federal Power Act, it seems clear that "the pattern of this legislation and its history" do not reveal any purpose to afford a private right of action, but plainly show a contrary purpose.

(A) Under the Federal Power Act jurisdiction to keep filed rates in conformity with the "just and reasonable" standard is vested exclusively in the Commission, and the role of the courts is limited to (i) aiding Commission enforcement and (ii) reviewing Commission orders, within defined limits.

Whether Congress intended to create a private right of action to determine reasonableness of rates cannot be ascertained, as petitioner has sought to do, from an isolated sentence or two of the Federal Power Act. Part II (Sections 201 to 209, 16 U. S. C. 824 to 824 h, inclusive) and Part III (Sections 301 to 319, 16 U. S. C. 825 to 824 r, inclusive) of the Act were enacted together.[3] Their provisions are related and integrated parts of a comprehensive regulatory program, and all must be taken in their legal and historical context in determining the roles which Congress assigned to the Commission and to courts respectively. Accordingly, before examining the rate sections (Sections 205 and 206, 16 U. S. C. 824d and 824e) in detail, a brief survey of the whole of Parts II and III will be helpful.

1. Summary of Parts II and III of the Act.

Part II contains a series of provisions, both substantive and administrative, concerning "public utilities," and Part III contains additional provisions, mostly administrative in character, concerning "licensees" and "public utilities". Throughout Part II there is not a single mention of any court or any judicial function, whereas "the Commission" is everywhere. Just as this Court said of

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3 Part I of the present Act is the Federal Water Power Act of 1920 relating to so-called "licensees" and is not here involved.

the essentially similar Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717 et seq., in *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, 617:

> "Congress has entrusted the administration of the Act to the Commission not to the courts."

The keynote of *Commission* jurisdiction is found in the very first section (Section 201, 16 U. S. C. 824):

> "(b) The provisions of Sections 824-824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, • • •. *The Commission shall have jurisdiction* over all facilities for such transmission or sale • • •
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> • • • • • • • •
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> "(e) The term 'public utility' • • • means any person who owns or operates facilities *subject to the jurisdiction of the Commission* under Sections 824-824h of this title." (Emphasis supplied.)

In each of the succeeding sections of Part II and Part III dealing with particular aspects of utility regulation substantive and administrative provisions are interwoven and the entire administration is entrusted to the Commission.

The first mention of any judicial function or authority is in the section on judicial review of Commission orders (Section 313, 16 U. S. C. 825 l) and the enforcement sections (Sections 314-317, 16 U. S. C. 825m to 825p, inclusive). The former section provides for limited review by circuit courts of appeals—not district courts. As to the several enforcement sections, the role of the Commission is again primary, but Congress strengthened its hand by authorizing it to invoke the aid of the courts in several different ways. Thus the Commission may seek injunctions to prevent violations or enforce compliance (Section 314, 16 U. S. C. 825m), it may request the institution of criminal

proceedings (Sections 314 and 316, 16 U. S. C. 825m and 825o), and it may fix the amount of certain forfeitures recoverable by the United States (Section 315, 16 U. S. C. 825). As to Section 317 (16 U. S. C. 825p), the Court of Appeals correctly held that it was designed to give federal courts exclusive jurisdiction (i. e., exclusive of State courts) over the various types of court proceedings specifically authorized in and by the three sections immediately preceding it, and has no reference to private suits of any kind.[4]

2. The rate provisions: Sections 205 and 206 (a).[5]

As in the statute as a whole, so also, in Sections 205 and 206 (a) there is the intermingling of substantive and administrative provisions, and the administrator is exclusively the Commission. In paragraphs (a) and (b) of Section 205 are the substantive standards: rates are to be just and reasonable—otherwise they are declared to be "unlawful"—and may not be discriminatory or preferential. In paragraphs (c), (d) and (e) of Section 205 and in paragraph (a) of Section 206 are provided the administrative means to achieve these standards: schedules of rates are to be filed with the Commission and kept open for public inspection; no change may be made in filed rates except after notice to the Commission and the public by appropriate filing; the Commission may, upon complaint or on its own motion, suspend the operation of a new rate schedule pending hearing; and once a rate has become effective the Commission may, on complaint or on its own motion, hold a hearing to determine whether it conforms with the substantive standards, and if not, may determine, and compel adoption of, a proper rate under those standards. By Section 206 (b) the Commission is empowered to investigate

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4 See pages 28-30, infra. The full text of this Section is set out in the Appendix, p. 50.

5 The full text of these provisions is set out in the Appendix, pp. 45-47.

and determine costs of production and transmission in certain situations where it has no authority to establish a rate.

Read by themselves, and even more so when read in their statutory context, Sections 205 and 206 (a) say plainly and unmistakably: *"The Commission is to have exclusive jurisdiction—through the mechanics of filing, publicity, complaints, investigations, hearings and orders, as detailed in the Act—to regulate wholesale rates in conformity with the standards set forth in Section 205 (a) and (b)."* These sections were patterned closely after the rate provisions of the Interstate Commerce Act (49 U. S. C. 1 et seq.) and similar statutes[6] with a few important changes occasioned by the difference in the subject matters (pages 24-28, infra). They embodied a half century's accumulated experience and doctrine on rate regulation, which petitioner now asks this Court to ignore.

3. The doctrine of exclusive jurisdiction.

The doctrine of exclusive jurisdiction of administrative agencies originated in decisions of this Court under the Interstate Commerce Act, holding that courts are without jurisdiction to find or determine the reasonableness of rates filed with the Interstate Commerce Commission but not found by that Commission to be unreasonable—notwithstanding the election given by Section 9 of that Act (of which there is no counterpart in the present Act) to a person claiming to be damaged to make complaint to the Commission or to bring suit in a district court of the United States. The venerability and vitality of the doctrine were expressed by this Court in *United States v. Interstate Commerce Commission* (1949), 337 U. S. 426, 437:

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6 Hearings, House Committee on Interstate and Foreign Commerce, on H. R. 5423 (74th Cong., 1st Sess.), pp. 392, 393, 2170.

> "But it has been established doctrine since this Court's holding in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, * * * that a shipper cannot file a § 9 proceeding in a district court where his claim for damages necessarily involves a question of 'reasonableness' calling for exercise of the [Interstate Commerce] Commission's primary jurisdiction."

The doctrine has been applied in multitudinous cases and by now—

> "has pervaded the entire realm of administrative law. Railroad legislation developed the doctrine, public utility expanded it, tax litigation extended it, and now the rapidly enlarging fields of labor and industry regulation have adopted it."[7]

The *Abilene* case had emphasized the need for *uniformity* as a rationale of the doctrine.

The recent case of *United States v. Jones* (1949), 336 U. S. 641, contains a succinct statement of another important rationale of the doctrine, namely, *"expertise"*:

> "Not only is rate making essentially legislative in the first instance. The policy of judicial restraint is one having regard for the *expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function.* Such doctrines or policies as those of 'primary jurisdiction' and ex-

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7 51 Harv. L. Rev. (1938) 1251, 1252. The quotation is from a note entitled "Primary Jurisdiction—Effect of Administrative Remedies on the Jurisdiction of Courts," in which "primary jurisdiction" is shown to have two main branches, namely: (1) exclusive jurisdiction, where the court has no jurisdiction of the subject matter at all, and the commission must decide the question, with judicial review ordinarily only to safeguard the requirements of due process of law, and possible court action to enforce the commission's order; and (2) exhaustion of remedy, where the court has jurisdiction of the subject matter but the suit is premature, and the court refuses to decide the case until all possible administrative determination has been completed. Cf. K. C. Davis, Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction (1949-1950), 28 Texas Law Review, p. 168 et seq., p. 400 et seq.

haustion of administrative remedies lie at the very root of the problem." (Emphasis supplied.) (l. c. 652)[8]

Both grounds of decision—*uniformity* (Abilene) and *expertise* (Jones)—are valid and relevant in the case of the Federal Power Act, and each helps to illuminate Congress' purpose and intent. To permit the district courts to determine reasonableness of filed rates retrospectively in private litigation would do violence to both.

(B) Congress's deliberate omission of a reparations provision from the Federal Power Act, for the specific reason that such a provision would be inappropriate in a statute regulating wholesale rates, confirms the intention to confer exclusive jurisdiction upon the Commission.

Petitioner has attempted to distinguish the cases applying the doctrine of exclusive jurisdiction under the Interstate Commerce Act by pointing to the absence of a provision in the Federal Power Act authorizing the granting of reparations (Pet. Brief, pp. 23-4). The theory of the argument seems to be that the absence of a reparations remedy before the Commission warrants the *inference* that a private right to direct relief in the district courts was intended. But when the particular and cogent reasons for omitting a reparations provision from this statute are taken into account, the intention of Congress to exclude any private right to sue stands out clearly.

The controlling consideration in enacting the statute was to regulate only *wholesale* rates (rates charged pur-

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8 See also the following statement in *Mississippi Valley Barge Line Co. v. United States et al.* (1934), 292 U. S. 282, 286:

"The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the [Interstate Commerce] Commission, by training and experience is qualified to form [citing cases]. It is not the province of a court to absorb this function to itself."

chasers for resale, not those charged retail consumers)—yet its aim was to protect *retail* consumers.[9] If the ultimate (retail) consumers ever are to benefit by regulation of wholesale rates, compliance with the substantive standards contained in Section 205 (a) and (b) must be attained during the period when a particular rate is actually in effect, i. e., must be achieved by prospective action and not *ex post facto* through recovery of reparations. This follows from the very nature of the relationship between wholesale rates and retail rates. If wholesale rates are maintained in conformity with statutory standards, by prospective regulation, the ultimate consumer will be the beneficiary. This Court said in *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 577, 581, immediately after the passage quoted in footnote 9 herein:

> "The rates charged a wholesaler are part of its costs, reflected in its rate base. Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility."

On the other hand, if wholesale rates are not kept in line by prospective regulation, ultimate consumers will derive no benefit from a later recovery of reparations—the retail rates actually paid by them during the past period in question having been predicated on the wholesale rates actually in effect during such period—and the only result will be but a windfall to the wholesaler.

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[9] See *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 577, 581, and *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, 610, 612, relating to the parallel provisions of the Natural Gas Act, and particularly the following statement in the *Interstate Natural Gas Co.* case (l. c. 581):

> "The aim of the [Natural Gas] Act was to protect ultimate consumers of natural gas from excessive charges * * *. They were the intended beneficiaries of rate reductions ordered by the federal commission, * * *."

The establishment by a district court *ex post facto* of a different rate from that on file in the Commission would accomplish none of the purposes of the Federal Power Act. Obviously the intent of the Act was not to create damage windfalls between wholesale utilities long after any differences in balance which may have existed between them had been distributed to their consumer-customers. The failure of the Act to support such a result as this neither implies a violation of the Act itself nor supports the claim that either of the wholesalers now has a *right without a remedy*. The legislative history contains specific and pointed evidence that such result would be precisely against the reasoning of Congress. As originally introduced, the Senate and House Bills (S. 1725 and H. R. 5423, 74th Cong.) each contained a reparations provision, providing that (a) the Commission could order reparations for past payments of unreasonable rates, on complaints filed within two years after payment, and (b) if the utility did not comply, action could be brought on the Commission's order in a court of competent jurisdiction. However, these and certain other provisions were omitted by the Senate Committee for the express reason that:

> "They are appropriate sections for a State utility law, but the Committee does not consider them applicable to one governing merely wholesale transactions." [10]

This latter conclusion was arrived at by the Committee after hearing testimony of the General Solicitor of the National Association of Railroad and Utilities Commissioners as follows:

> "That is an entirely proper provision in a railroad statute. When a man goes to the railroad station with a load of goods to ship somewhere he has to ship at the rate that is fixed in the tariff. He must make the

10 Senate Report No. 621, 74th Cong., 1st Sess., p. 20.

shipment then; and he ought to be able to come thereafter to the Commission and show that he was required to pay an unreasonable rate, if it was unreasonable, and to ask for a determination of a reasonable rate and get reparation that is due him for any overpayment. That is perfectly proper. But this bill relates only to service *between the wholesale generating or producing company and the distributing utility.* We question whether the *public interest* will be served by giving any company the right to go ahead receiving service at the established rate for 2 years, and then to bring a complaint before the Federal Commission that the rate has been unreasonable." (Emphsis supplied.) [11]

Thus, the determination of Congress to rely on prospective regulation exclusively and not to provide for private suits to recover reparations was deliberate, occasioned by the specified reason that only wholesale rates were involved. If the suggested reparations provisions had been retained, the Commission (not the courts, except by way of enforcing Commission determinations) would have had the power (not indefinitely, but subject to a two-year time limitation) to adjust a particular rate retrospectively, to accord with the just and reasonable standard. In such case the filed rates would not have been conclusively "lawful," i. e., in conformity with the substantive standard. But Congress concluded that the purpose of benefiting ultimate consumers would not be served by permitting retrospective determinations of reasonableness of wholesale rates. It preferred to make the filed rate conclusively the lawful rate and to rely upon the statutory machinery of filing, publicity, complaints, hearings, and reports to maintain filed rates in conformity with the standard of reasonableness.

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11 Hearings, Committee on Interstate and Foreign Commerce, Public Utilities Holding Companies, on H. R. 5423, 74th Cong., 1st Sess., p. 1685.

Neither the statutory language nor the legislative history permits the conclusion that, by declining to give the Commission a limited reparations power for the reason disclosed in the hearings, Congress inferentially conferred an unlimited reparations power on the courts. To the contrary, both the language of the Act and the legislative history make it abundantly clear that Congress intended that no private rights to sue for reparations should exist.[12]

(C) **Section 317 of the Act has reference to the several types of judicial proceedings enumerated in preceding sections of the Act, and does not itself create or infer a private right of action.**

Neither the complaint below nor petitioner's brief in this Court claims that any specific section of the Federal Power Act confers jurisdiction upon the District Court. However, after referring to the Judicial Code as a sufficient source of jurisdiction, the brief suggests that Section 317 of the Federal Power Act, 16 U. S. C. 825p[13] "seems to confirm jurisdiction of cases like this to the United States District Courts * * *" (Pet. Brief, p. 5, compare id. p. 17).

When Section 317 is read in the light of the three immediately preceding sections, it is clear that it has no relevance at all to cases such as this. Those sections provide for enforcement of the Act by various types of proceedings at law and in equity: injunctions, forfeitures, mandamus actions, and criminal proceedings. Section 317 says that federal courts are to have jurisdiction in the enumerated classes of proceedings, to the exclusion of the State courts. It is not necessary to look elsewhere for any additional meaning of Section 317.

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12 No right or remedy to attack public utility wholesale rates fixed by contract, on the ground of unreasonableness, existed at common law: *Arkansas Natural Gas Co. v. Arkansas R. R. Commission et al.* (1923), 261 U. S. 379; *Southern Iowa Electric Co. v. City of Chariton, Iowa, et al.* (1921), 255 U. S. 539; *City of Paducah et al. v. Paducah Ry. Co.* (1923), 261 U. S. 267.

13 The full text of this Section is set out in the Appendix, p. 50.

Here, again, the legislative history fully supports the conclusion that Section 317 was intended only to refer to Commission enforcement, not private suits. In their official statements to Congress concerning the proposed legislation, Commissioner Clyde L. Seavey and Solicitor Dozier DeVane of the Federal Power Commission said:[14]

> "Sections 311 and 312 [now Sections 314 and 317 of the Act] give to the Commission power to resort to appropriate United States courts for the enforcement of the provisions of the act and its orders and give to such courts the necessary authority to enforce the same."

Petitioner refers (Pet. Brief, p. 18) to two district court cases arising under the Securities Exchange Act of 1934, 15 U. S. C. 78 et seq., as involving "a similar question." These were cases applying the familiar tort principle that a violation of a statutory prohibition will create a right of action in favor of a person injured thereby, if he was of the class intended to be protected. In each of those cases the question was properly treated as a matter of legislative intent as shown by the entire statute in question, its legislative history.[15] In the present case, on the other hand,

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14 Respectively: 74th Congress, 1st Session, Hearings before the Committee on Interstate and Foreign Commerce on H. R. 5423, p. 388, and Hearings before the Committee on Interstate Commerce on S. 1725, p. 249.

15 In *Massachusetts Universalist Convention v. Hildreth & Rogers Co.* (1949), 87 F. S. 822, another judge of the same district court which had decided *Remar v. Clayton Securities Corporation* (D. C. Mass., 1949), 81 F. S. 1014, one of the two cases relied upon by petitioner, held that there was no intention to create a private remedy under the Federal Communications Act, saying:

> "The only function of the courts in the enforcement of the Act is the exercise of the right to enforce or review orders of the Commission under Sections 401 and 402 of the Act. * * *
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> "In the light of the scheme of enforcement by means of an administrative agency which Congress has chosen to select, it cannot be held that Congress intended to create by implication additional rights such as those for which plaintiff contends. The Communications Act is not designed primarily as a new code for the judgment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." Federal Communications Commission v. Pottsville Broadcasting Co.,

petitioner is not a member of the class intended to be benefited, as is apparent from the text of the statute and the legislative history discussed supra, pp. 19-21, and the decisions of this Court under the comparable Natural Gas Act, *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 557, 581, and *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U. S. 591, 610, 612, 659. Furthermore, the present case involves not a simple violation of a prohibition, as in the cases cited by petitioner, but a determination of the reasonableness of rates as to which jurisdiction of a court in the first instance is not to be inferred. The importance of this distinction is cogently brought out in the recent opinion of the Court of Appeals for the Second Circuit in *Civil Aeronautics Board et al. v. Modern Air Transport, Inc.* (1950), 179 F. 2d 622, 624-625.

Petitioner apparently seeks to find in Section 317, and in the two cases cited by it relating to a wholly different statute, a substitute for the reparations provision which Congress considered and rejected in enacting this statute. Congress having shown its contrary intention so clearly, petitioner's effort must fail.

III.

Petitioner's Claim That No Administrative Remedies Were Available Is Wholly Unwarranted and Affords No Basis for Direct Resort to the District Court.

The Court of Appeals held that none of the contentions of petitioner, including the claim that "defendant's acts

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309 U. S. 134, 138, 60 S. Ct. 437, 439, 84 L. Ed. 656. The enforcement of the Act by the Commission would be hindered rather than aided if the plaintiff's contentions were correct. The problem of defining the public 'interest' under the Act is one appropriately left to the Commission rather than in the first instance to the courts, for it is one which is complicated by problems peculiar to the radio industry" (l. c. 825).

These considerations apply with at least equal strength to rate making in the public utility field.

were fraudulent because defendant and plaintiff's predecessors had common officers", justified the District Court in awarding damages to petitioner (R. VI, 1994). Petitioner challenges this holding by advancing the theory that, even if the Commission has exclusive jurisdiction over rates where a complainant is free to invoke its protection prospectively, the District Court must have had jurisdiction to examine the question of reasonableness retrospectively in this case because "domination" through interlocking managements prevented timely recourse to the Commission.

This theory rests on four separate premises, each of which is essential to sustain it:

(a) That the interlocking of management between respondent and petitioner's predecessors constituted constructive fraud amounting to "domination" by the former over the latter (Pet. Brief, p. 12).

(b) That this "domination" prevented timely recourse to the Commission (Petition, p. 5; Brief, pp. 16, 21, 22, 26).

(c) That since the Commission has no reparation power, no resort to the Commission was available to petitioner after it came upon the scene in 1945 (Pet. Brief, pp. 3, 16, 22).

(d) That the District Court had jurisdiction to award reparations if the Commission could not do so (Pet. Brief, pp. 3, 16, 28).

Each of these premises is unsound and petitioner's conclusion bottomed thereon is untenable.

(A) The express sanction of the FPC under Section 305 (b) of the Act to the partial interlocking of managements between respondent and petitioner's predecessors disproves as a matter of law petitioner's claim that the joint management constituted constructive fraud on its predecessors by respondent, and prevented them from resorting to the FPC.

Section 305 (b) of the statute, 16 U. S. C. 825d (b), provides that

> "* * * it shall be unlawful for any person to hold the position of officer or director of more than one public utility * * * unless the holding of such positions shall have been authorized by order of the Commission upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby."[16]

This provision is broad enough to cover all interlockings of management between public utility companies subject to the Act, whether or not the particular companies happen to have physical connections or business relationships in addition to the interlockings. The question of adverse effect on public or private interests must necessarily be decided by the Commission in light of the particular facts presented,[17] and if there are known to be important interconnections and business relationships between two public utilities having common personnel, this obviously is a factor of great importance.

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16 The full text of this Section is set out in the Appendix, p. 48.

17 In denying the applications prayed for in *Matter of Applications of John Edward Aldred et al.* (1940), 2 FPC 247, 260, the Commission said:

> "By the enactment of Section 305 (b) of the Act, Congress made unlawful the holding of so-called multiple directorships unless the holding of such positions shall have been authorized by order of this Commission, and placed the burden for showing that neither public nor private interests will be adversely affected thereby upon the applicant. Obviously, therefore, this Commission is required to inquire into and determine with respect to each application presented for its approval, whether the circumstances and conditions found therein are such as may reasonably be expected to accomplish that purpose."

On the other hand, the Commission's jurisdiction under Sections 205 and 206, already discussed in detail (pp. 21-22, supra), extends broadly to all intercompany contracts establishing rates, whether or not there is any interlocking of personnel between the parties. But where interlocking does exist, that fact is necessarily known to the Commission and presumably has an important bearing on the nature and extent of the Commission's actual scrutiny of a particular rate schedule in the exercise of its various statutory powers.

In the present case, plaintiff's predecessors and respondent were all "public utilities" within the meaning of the Act. Thus, the Commission had two separate but complementary sources of jurisdiction in dealing with the actual facts of the case: (1) Over the ten-year period 13 separate applications were filed and allowed in 11 orders issued under Section 305 (b) (R. I, 324-343, 353-362). The Commission thus had many occasions to consider the possible effects on public or private interests of the interlockings here involved. It had the power and duty to do so in light of the known fact that there were continuing business relationships of prime significance between the companies.[18] (2) The Commission had complete jurisdiction also to control the basic terms of those business relationships under Sections 205 and 206. It had the power and duty to do so more especially in light of the known fact that the contracting parties had interlocking managements.[19]

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18 Furthermore, the question of possible adverse effect on public or private interests was subject to reopening at any time or from time to time throughout the ten-year period, inasmuch as each of the Commission's orders granting an application to be a director or officer of more than one company expressly reserved to the Commission the power to reopen the question in the future (R. I, 357-362). At no time in the ten-year period did the Commission ever question the propriety of continuing any of the interlockings authorized by its orders in this situation (R. V, 1510, 1587-1588).

19 In addition to analyzing data contained in the filed rate contracts, the FPC inquired about the technical phases of the operation of the contracts, and requested further data relating to the rates, prior to making certain of the orders approving the filings (see, e. g., as to the interconnection charge: R. I, 277-282; and again R. I, 290-296, when the FPC

With both sides of the problem before it, each bearing directly upon the other, the Commission over a ten-year period entered 11 orders authorizing interlockings and accepted 8 different rate filings involving respondent and petitioner's predecessors, and never raised any question as to the propriety of continuing the interlockings on the one hand or as to the justness and reasonableness of the rate contracts on the other hand.[20]

No interested consumer, stockholder, municipality or other person or agency ever requested it to do so, and none of the orders which the Commission entered in connection with the above matters was ever made the subject of judicial review under Section 313 by "any person, State, municipality, or State commission aggrieved" (R. V, 1587-1588).

No joint management arrangement thus entered into in compliance with the law and procedure of the Act can give rise to constructive fraud. Nor can it become the basis for a collateral attack on that agency's jurisdiction. Thus, the first premise which underlies petitioner's theory is invalid.

(B) Administrative remedies were always available to the non-interlocked director (White) of petitioner's predecessors and to UPU (petitioner's vendor and the sole stockholder of petitioner's predecessors).

The second difficulty with petitioner's argument at this point is that it overlooks the all-important director of each

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inquired into certain aspects of the reserve capacity charge). Furthermore, most detailed information as to the generating capacity of each plant, demands, reserve capacities and apportionment of the resulting charges was supplied to the FPC at least yearly in the Supplements to the Interchange Capacity Agreement (R. I, 300-321, 248-257). Again the FPC received throughout the period verified Annual Reports showing financial statements and such matters as relations with affiliated and non-affiliated companies, production costs, rates, rents, interchanged power and method of settlement thereof and statistics concerning the generating facilities (R. II, 643-647).

20 R. I, 357-362, 34, 35, 43, 61, 68, 87, 103, 108-111, 267-269, 283-285, 299-300, 353.

of petitioner's predecessors who was not on the board of respondent at any time: Samuel W. White, the president of UPU. Petitioner did not even purport to show that White was prevented from resorting to the Commission at any time within the ten-year period.[21]

White's complete independence of his fellow directors, as well as his energy and resourcefulness in upholding the interests of his own companies, are conclusively demonstrated by the whole record of evidence, the highlights of which are summarized in the Statement, supra, pp. 4-7.[22] The evidence established that White was free and willing to do everything necessary to promote and protect the interests of the northern companies. There is not the slightest factual basis for suggesting that he would not have been equally free and willing to complain to the FPC if the interests of the UPU subsidiaries had so required. Indeed, he personally took an active and important role in the dealings of the northern companies with the regulatory agencies, including arrangements relating to the filing of the contracts with the FPC (R. IV, 1177-1178, 1224-1225).

Apart from White personally, UPU was a company having other directors, officers and stockholders, not to

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21 In the fourth paragraph of its Specification of Errors (Pet. Brief p. 10) petitioner refers to "the findings of the Trial Court that the petitioner's predecessors were from 1935 to 1945 under the domination of the defendant [respondent] *and therefore unable to resort to the Commission* * * *." (Emphasis supplied.) While the trial court did refer, in one of its Conclusions of Law, to "the fact that plaintiff's assignor and its predecessors were under the domination and control of the defendant" (Conclusion 18, R. V, 1964), there is no Finding or Conclusion dealing directly with the question of whether petitioner's predecessors were or were not able to resort to the Commission; nor is there any Finding or Conclusion on the question of whether White or UPU were precluded from resort to the Commission.

22 Cf., the following passage in the opinion of the District Court:

"I have no doubt but what Mr. White used his best judgment and his energies in an effort to so conduct those companies as to produce for the holding company, United Public Utilities, the greatest profit that he could, but I am convinced from the evidence in this case that in passing upon the conduct of these joint directors and officers in the transactions between the corporations which were controlled by them and which were operated by them, that he also had in mind the benefit which might accrue to some other corporation that he had [referring to a wholly owned subsidiary of UPU which supplied coal to the northern companies and respondent]" (R. V, 1886).

mention its own employees, engineers and attorneys. It cannot be questioned that UPU's access to the Commission was free and unrestrained at all times during the period—even if the contrary be assumed as to the northern companies themselves for the sake of argument. As the sole stockholder of those subsidiaries, upon which it depended for at least 60% of its net earnings, UPU had a direct and important financial interest in the fairness of the intercompany contracts (R. IV, 1094). Had there been any reason to complain of the contracts in whole or in part, UPU could have complained to the Commission at any time. There is nothing in the Act limiting the right of complaint to a contractual party; on the contrary, the regulatory pattern depends upon providing the widest possible publicity and opportunity to complain about filed rates. UPU never made any complaint or sought any other administrative remedy; whether because it had no grievance, or because it failed to voice it, is here unimportant.

Petitioner, besides being assignee of the former UPU subsidiaries, is the vendee of UPU. UPU's failure to make any use of the administrative remedies which were fully and freely available to it involves the petitioner. Thus even if assuming arguendo that mere absence of other remedies were sufficient to confer jurisdiction on the District Court, this particular basis of jurisdiction would not be available to petitioner.

(C) Petitioner itself failed to exhaust its administrative remedies before the FPC after its purchase in 1945.

Even if it be assumed that petitioner's vendor, as well as its predecessors, had no administrative remedies (violent assumption), petitioner itself did have certain remedies which it failed to pursue after its purchase of the Dakota stock in 1945.

Petitioner's brief devotes much attention to the question of whether the Commission has power to award reparations

under the Act, but this is not in issue. The Court of Appeals did not hold, and neither the respondent nor the Commission has asserted, that the Commission does have such power. But it does not follow that petitioner had no remedies under the Act.

Originally petitioner complained that improper, irregular and illegal filings of the contracts with the Commission were such as to render all of the filings, and the rates and charges founded thereon, illegal. That was the position in this case in the Court of Appeals. But the point has been abandoned in the petition for certiorari and need not further concern us. Whether constructive fraud, as complained of, due to the authorized interlocking officers and directors of the parties, could in any circumstances amount to a claim of fraud upon the Commission is questionable. Petitioner does not say so in its original complaint, but for the purpose of this argument let us concede (while actually denying) that the complaint of constructive fraud on petitioner's predecessors through which allegedly void contracts were negotiated and made amounts to a claim of fraud on the Commission, as well as on the other party to the contract.

Upon such assumption, a complaint so challenging the validity of the filed and legal rates would involve an attack upon the orders of the Commission approving those filings and should be addressed to the Commission. No such collateral attack as that attempted here would be permissible even in those circumstances. *Adams v. Nagle et al.* (1938), 303 U. S. 532; *Watab Paper Co. v. Northern Pac. Ry. Co.* (C. C. A. 8, 1946), 154 F. 2d 436, 438; *Tilney et al. v. City of Chicago, Ill., et al.* (C. C. A. 7, 1943), 134 F. 2d 682, 683; 42 Am. Jur., paragraphs 158, 159, pp. 514-517.

Petitioner asserts that the Commission "is not specially qualified to deal with" the issue of fraud (Pet. Brief, p. 26). There are two complete answers to any such contention:

1. No tribunal is as well equipped as the FPC to understand and determine a fraud issue such as the one assumed here, since it alone has a backlog of specific information both as to the technical features of the rates and as to the operation of the contracts.[23]

2. Where the perversion of an agency's own processes by fraud is alleged, "Every tribunal has inherent power to re-open and revise a decision induced by fraud." (United States Supreme Court Justice Roberts, as Umpire for the Mixed Claim Commission, United States and Germany, Opinions and Decisions, January 1, 1933—October 30, 1939, page 1127.) Cf. *Lane v. United States ex rel. Mickadiet* (1916), 241 U. S. 201; *Tagg Brothers and Moorhead v. United States* (1930), 280 U. S. 420; *Hanlon v. Town of Belleville et al.* (1950), 4 N. J. 99, 71 A. 2d 624, 627; K. C. Davis, Res Judicata in Administrative Law (1947), 25 Texas L. Rev. 199, 236. As this Court said in *Pacific Railroad Company v. Ketchum et al.* (1880), 101 U. S. 289, 296:

> "The remedy for the fraud or unauthorized conduct of a solicitor, or the officers of the corporation, in such a matter, is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained."

Cf. *Universal Oil Products Company v. Root Refining Co.* (1946), 328 U. S. 575, 580; *Hazel-Atlas Glass Co. v. Hartford Empire Co.* (1944), 322 U. S. 238.

Besides this inherent power possessed by all tribunals, the Commission has *express* power under the Act to "investigate into facts, conditions, practices, or matters which it may find necessary or proper to determine whether any person has violated or is about to violate any provision of this chapter, or any rule, regulation or order thereunder, or to aid in the enforcement of the provisions of this

23 See footnote 19, supra, p. 33 of this brief.

chapter * * *" [Section 307 (a), 16 U. S. C. 825f (a)],[24] and it is also empowered "to perform any and all acts and to prescribe, issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this chapter" (Section 309, 16 U. S. C. 825h). If the Commission's orders were indeed induced by fraud and domination, a more obvious occasion for the exercise of these powers would be hard to imagine. The Court of Appeals properly held that "The Commission can, no doubt, correct its own mistakes" (R. VI, 1995).

Would it have been useful to petitioner to invoke these remedies, absent the power to award reparations? It not only would have been a useful step, it was an indispensable one under existing statutory procedures. As the discussion under Point II (B), supra, has shown, the orders of the Commission specifying effective dates for the contracts established the filed rates as the only legal rates, binding on everybody until disestablished by appropriate action of the companies or appropriate proceedings of the Commission. If petitioner was to have any right to question the reasonableness of the filed rates in any tribunal, judicial or administrative, state or federal, it first had to remove the conclusive barriers to such inquiry which had been created by the filing of the rates pursuant to the statute and the unchallenged orders of the Commission establishing the legal rates.[25]

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[24] The full text of this Section is set out in the Appendix, p. 48.

[25] It is noteworthy that petitioner in the case at bar did file a complaint with the FPC alleging that existing rates were unjust and unreasonable and asking that the FPC establish different rates for the future (R. I, 149). Petitioner, however, did not ask that the Commission investigate the alleged fraud nor did it pray that the Commission set aside its orders approving the filing of the rates or the interlocking management.

For present purposes it is unnecessary to decide whether the Commission could and should have been requested, in addition to setting aside the filing orders, to make findings as to reasonable rates in lieu thereof. Concurring in *Federal Power Commission v. Interstate Natural Gas Co.* (1949), 336 U. S. 577, 589, Mr. Justice Frankfurter said: " * * * the Court of Appeals should ask the Federal Power Commission for an advisory report * * *. But a court of equity has inherent powers to invite such help from a great agency of the Government * * *."

Petitioner chose to ignore the FPC, which had voluminous files on the transactions in issue, as to the rates, the common directors and the transfer by Dakota to petitioner itself (cf. R. V, 1577-1583). It detoured to the District Court, and in doing so violated both the rules of primary jurisdiction and of exhaustion of administrative remedies. The Court of Appeals properly held that this could not be done under the law. As the Court pointed out in reference to the rule of exhaustion of administrative remedies, in *Meyers et al. v. Bethlehem Shipbuilding Corp., Ltd.* (1938), 303 U. S. 41, 51:

> "That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."

(D) Even assuming lack of all administrative remedies, the District Court nevertheless lacked jurisdiction to sustain petitioner's claims.

If we make the final assumption, contrary to what has been shown in Point III (A), (B) and (C) above, that neither petitioner nor its vendor, nor its predecessors, had administrative remedies, it still does not follow that there was a remedy under the Act by civil proceedings in a District Court.

Contentions analogous to those urged by petitioner here were advanced and rejected in *Backus-Brooks Co. v. Northern Pac. Ry. Co. et al.* (C. C. A. 8, 1927), 21 F. 2d 4, 11, cert. den. (1927), 275 U. S. 562, and in *Mississippi Power & Light Co. v. Memphis Natural Gas Co.* (C. C. A. 5, 1947), 162 F. 2d 388, cert. den. (1947), 332 U. S. 770. In the former case, alleged domination by defendant over the corporation, on whose behalf plaintiff was suing, was held to be of no avail to confer jurisdiction on the court to determine the just and reasonable division of joint rates under the Interstate Commerce Act, even though the

Interstate Commerce Commission had no power to award reparations in the circumstances. In the latter case the fact that no administrative remedies were available to Mississippi, a wholesale purchaser of natural gas from Memphis, and the fact that Mississippi "was requested by Memphis to defer action" (l. c. 390) until it was too late to get prospective relief before the FPC, were held not to sustain Mississippi's claim for relief. To grant that claim "would be tantamount to forcing new rates on Memphis" (l. c. 391). The Court of Appeals affirmed the decision of the court below that "until the Commission changed the rate, the contract rate between Memphis and Mississippi [filed with the Commission] was the lawfully promulgated rate" (l. c. 389-390).

As in those cases, so in this case: *"Ubi jus, ibi remedium" does not supply any answer, but poses a new question—what "right" does petitioner have under the Act?* It has been seen (pages 24-28) that Congress quite deliberately omitted a reparations provision from this statute for the reason that such a provision would not benefit ultimate consumers in accordance with the purpose of the Act but might only produce windfalls for wholesale purchasers. For this reason, wholesale purchasers were given the right to invoke the jurisdiction of the Commission to regulate rates prospectively under the procedures provided in Sections 205 and 206, but they were not given any "right" to a windfall through either Commission or court proceedings for reparations.

What petitioner asserts here is essentially a "right" to a windfall which Congress intentionally withheld. If it were true, as contended by petitioner, that over the ten year period the price received by respondent for energy sold to petitioner's predecessors was too high and the price paid by respondent for energy purchased from petitioner's predecessors was too low, it would have to be presumed that over this period the difference has gone

into the retail rates of the three public utilities involved. That is to say, the undue benefits which respondent is alleged to have obtained would have gone out to its ultimate consumers through the rates paid by them, and the undue burdens which plaintiff's predecessors are alleged to have borne would have been passed on to its ultimate consumers through the resale rates paid by them. There is no suggestion in the record that respondent earned more than a fair return or that petitioner's predecessors earned less than a fair return at any time. In these circumstances the determination by the District Court of different rates from those on file during the ten year period ending in 1945 could accomplish none of the purposes of the Act, but could only confer a windfall contrary to the purposes of the Act; a gift from respondent, of moneys it no longer has, to the petitioner—of moneys already returned to petitioner's predecessors by their customers.[26] Violation of the Federal Power Act thus cannot be the true ground for this action.

In *General Committee etc. v. Missouri-Kansas-Texas R. Co. et al.* (1943), 320 U. S. 323, 337, this Court said, immediately after the passage from the opinion quoted on page 18, supra, that unless the statutory purpose to afford a judicial remedy is plain "* * * the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result, many areas in this field where neither the administrative nor the judicial function can be utilized. * * * Courts should not rush in where Congress has not chosen to tread."

In the final analysis, there being no right to sue for damages under the Act because of alleged unreasonable rates

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26 The windfall aspect of this case is particularly striking since all of the matters complained of by petitioner occurred prior to October 19, 1945, and until that day petitioner owned no stock of, nor had any direct or indirect interest in, any of the UPU subsidiaries. When petitioner bought the Dakota stock from UPU, the transaction was authorized by the FPC and the SEC, and petitioner did not and does not claim that it paid more than a fair price for the utility assets and earning power it was acquiring.

(Point II, supra), petitioner's claim rests on the allegation in its complaint of fraud through common directors and officers. Whether petitioner emphasizes the origin of the contracts or the alleged inability to resort to the Commission, in either case the gravamen of petitioner's claim is alleged fraud and domination stemming from common directors and officers—a common-law action not involving a federal question. Since petitioner and respondent are both Delaware corporations (R. I, 2), the District Court lacked jurisdiction apart from the Federal Power Act as well as under the Act.

In the case at bar, the District Court has rushed in where Congress has most definitely chosen not to tread.

CONCLUSION.

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

(Pertinent Sections of the Federal Power Act, Parts II and III, 16 U. S. C. 824d et seq.)

§ 824d (§ 205). Rates and Charges; Schedules; Suspension of New Rates.

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract, relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classifica-

tion, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilites to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

§ 824e (§ 206). Power of Commission to Fix Rates and Charges; Determination of Cost of Production or Transmission.

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

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§ 825d (§ 305). Officials Dealing in Securities; Declaring Dividends Out of Capital Account; Interlocking Directorates.

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(b) After six months from August 26, 1935, it shall be unlawful for any person to hold the position of officer or director of more than one public utility or to hold the position of officer or director of a public utility * * * and the position of officer or director of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility, or officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. The Commission shall not grant any such authorization in respect of such positions held on August 26, 1935, unless application for such authorization is filed with the Commission within sixty days after that date.

§ 825f (§ 307). Investigations by Commission; Attendance of Witnesses; Depositions; Immunity of Witnesses.

(a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates. The Commission may permit any person to file with it a statement in writing under oath or other-

wise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

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§ 825h (§ 309). Administrative Powers of Commission; Rules, Regulations, and Orders.

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

§ 825p (§ 317). Jurisdiction of Offenses; Enforcement of Liabilities and Duties.

The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. Any criminal proceeding shall be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder may be brought in any such district or in the district wherein the defendant is an inhabitant, and process in such cases may be served wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.